PUBLIC PROSECUTOR

v.

BASRI MASSE

HIGH COURT BORNEO, KOTA KINABALU
ABU MANSOR ALI J
[CRIMINAL TRIAL NO. 4 OF 1984]
26 JANUARY 1986

CRIMINAL LAW: *Dangerous Drugs - Trafficking in a controlled drug - Without aid of presumptions - Prima facie case - Mere denial.*

Two constables PW12 and another lay in ambush after receiving information about a drug transaction. A taxi arrived and when PW12 opened the left rear door of the taxi, there was a passenger the accused, inside holding a bag between his legs. The bag was found to contain vegetable matter later identified by the Government chemist as 935 grammes of cannabis. There was a passenger in the front seat and the driver who, when searched, had nothing incriminating in their possession. When PW12 attempted to take the bag from between the accused's legs he resisted and later, at the police station attempted to run away.

The accused on oath stated that the package was not his but brought by his friend who was seated according to him not in front but beside him. He further stated that his attempt to run away from the police station was due to being told that for his offence he would be hanged. He further stated that he did not know to whom the package belonged.

Held:

[1] Without the aid of the presumption there was ample evidence to conclude that both before and after his arrest, in relation to the exhibit found beside him, he knew the nature of it and had the power of disposal over it and therefore had possession of the cannabis. There was sufficient evidence to show that he was trafficking, even without the aid of the presumption. With the aid of the presumption under s. 37(d) and (da), as the quantity was over 200 grammes, he was taken to be trafficking until the contrary was proved. The Court therefore ruled that there was a *prima facie* case for the accused to answer and the accused testified on oath. The accused did not call any witnesses and his would be witness had absconded:

[2] The Court observed that the accused's version did not raise any doubt on the truth of the prosecution story. His defence was nothing more than a denial and did not discharge the burden of characterising his story as reasonably true even though the Court did not believe in its truth. The accused was found guilty of the charge and was sentenced to be hanged even though at the time of commission of the offence the alternative life sentence was available.

Cases referred to:
PP v. Oon Lai Hin [1984] 1 CLJ (Rep) 317
Chang Liang Seng [1982] 2 MLJ 231

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1), (2)

For the DPP - Abdul Malik Hj. Ishak; Peguam Kanan Persekutuan, Sabah
For the accused - Vincent Wong (assigned); M/s. Jayasuriya Kah & Co.

JUDGMENT

Abu Mansor Ali J:

The accused was found guilty and convicted on 29 January 1986 on the following charge:

> That you on 16 February 1983 at about 7.30 p.m. at Jalan Terawi, Mile 6½, Putatan, in the District of Kota Kinabalu, in the State of Sabah, did traffic in dangerous drugs, to wit, 935 grammes of cannabis on your own behalf and that you have thereby contravened s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980), Act 234, and punishable under s. 39B(2) of the said Act.

The facts of the case were on the date named in the charge at about 4.30 p.m. or so DPC Selvan s/o Palaniappan (PW12) received information from his routine informer that there was going to be a transaction of drug at Jalan Terawi, M. 6½, Jalan Putatan. As he was not able to get any officer he and Constable Awang Amat went to the spot and laid an ambush. At about 7.30 p.m. taxi SA7155 arrived. It stopped and reversed and stopped not far from where the two constables were hiding.

PW12's attention was attracted to the passenger at the rear side of the taxi for the taxi's door was being opened or had been opened and he headed straight there. PC Selvan identified himself and he opened the left rear door of the taxi. There was a passenger inside, the accused. PW12 looked inside and found the accused holding a paper bag P20 in between the accused's legs. He took the bag away and examined its contents and he found wrapped paper packets containing vegetable matter which he believed to be cannabis (ganja). There was a passenger at the front beside the driver.

PW12 then searched the passenger and the taxi driver. When he found nothing both constables took the accused, the other passenger and the taxi driver to the police station, Kota Kinabalu.

The exhibits in two packages P7A and P8 were sent to Encik Khalid Safan (PW1), the Government chemist, and he testified that the exhibits were the dangerous drug, cannabis (ganja). The total weight of the vegetable matter was 935 grammes.

On this evidence the Court considered whether the prosecution had made out a *prima facie* case to warrant the accused's defence to be called. It considered whether there was possession and what evidence was there to prove possession? The taxi driver (PW16), told the Court that at about 7.00 p.m. on the day of arrest the accused and his friend got into his taxi to go to Putatan to the place where he was arrested. PW16 testified that it was the accused who carried the paper bag P20 and it was the accused who negotiated with him as to the fare and the amount of fare for waiting. When PC Selvan (PW12) wanted to take the bag from the accused which bag was between his legs in the taxi he resisted PW12's attempt. At the police station the accused attempted to run away. He was apprehended by Kpl. John Kuduon (PW14).

The Court concluded that without the aid of the presumption there was ample evidence to show both before and after his arrest that in relation to the exhibits found beside him he knew the nature of it and he had the power of disposal over it and therefore he had possession of cannabis. Since s. 2 of the Dangerous Drugs Act defines traffick to include "carrying" and "transporting" there was carrying and transporting of the 935 grammes of cannabis and without the aid of presumption to the Court there was sufficient evidence to prove that accused was trafficking. With the aid of presumption under s. 37(d) and (da) of the Dangerous Drugs Act 1952 the prosecution's case was even made stronger as the

accused had been found to be in possession of the paper bag P20 containing the offending 935 grammes of cannabis and under s. 37(d) he is deemed to have possession and to have known the nature of the exhibits and under s. 37(da) where as the quantity of the dangerous drugs exceeds 200 grammes he is also presumed to be trafficking until the contrary is proved. The Court believed and accepted the evidence of PW12, PW14 and PW16. Allowing for minor discrepancies their evidence in the main tell substantial truth that the accused was found in possession of paper bag P20 containing the offending exhibits.

The Court therefore ruled that there was a *prima facie* case for the accused to answer on the charge having ignored the whole of the evidence in respect of cannabis in P9 not relevant to the present charge. The Court called the accused to make his defence on the charge. He elected to give his evidence on oath.

In his evidence on oath he said that at about 6.30 p.m. (Maghrib) a friend, Abdul Patta, invited him to go to Putatan and he and Abdul Patta did get into PW16's taxi to go there. He wanted to see a friend, Jack. Both of them sat behind and the bag P20 was carried by Abdul Patta and he placed it between his right leg and Abdul Patta's left leg. He did not know what P20 contained. At the place of the incident PW16 stopped his taxi, reversed and stopped. Abdul Patta got out of the taxi. He went to a nearby house and met someone. Accused also got out when he left. When Abdul Patta left the taxi he also left the bag P20 on the floor and he re-entered the taxi. When he was inside he called the accused to come into the taxi and when he was a few yards away from the taxi. After he entered the taxi again he heard some people say "do not move". They were police. After he was almost back into the taxi one Indian policeman who was holding a revolver pressed the left door of the taxi in to close it and in the process his left foot was caught at the door. The Indian police constable came into the taxi and took the paper bag still on the floor in between him and Abdul Patta. He opened it inside the taxi itself and they were all then asked to get down from the taxi and searched and taken to the police station, Kota Kinabalu, where the bag P20 was emptied out on a table. He denied any knowledge of the offending exhibits and neither did he know who owned it except saying it looked similar to the substance belonging to one friend by the name of Bakri.

At the Kota Kinabalu police station he was told by some policemen whom he could not identify that for his offence he would be hanged. He was confused and he ran away. He was apprehended near the gate but still inside the police station by PW14.

The accused did not call any witness and his would-be witness, Abdul Patta, had absconded. The Court is satisfied that every effort had been made by the prosecution to trace Abdul Patta and defence was satisfied that the absence of Abdul Patta from the Court was through nobody's fault.

At the close of the defence the Court considered has defence story thrown a reasonable doubt on the truth of the prosecution's case and if he had explained could the explanation be reasonably true even though the Court does not believe in its truth? Has defence rebutted the two presumptions raised against him? The burden on him is a light one.

After having heard the accused, the Court found the accused's story did not raise any doubt on the truth of the case for the prosecution. His defence was nothing more than a denial that he was in possession of the paper bag and its contents.

The Court believed the uncontradicted evidence of Constable Selvan (PW12) and Constable Awang Amat (PW15) and the evidence of the taxi driver (PW16) that it was the accused who was sitting at the rear of the taxi by himself and he had the bag P20 in between his

legs when he was apprehended by PW12 and PW16 saw him carrying P20 before the accused entered his taxi. This evidence remained unshaken throughout the end of the whole case.

The state of guilt of the accused manifested itself by his own conduct at the police station when it was he who staged an escape while the taxi driver and Abdul Patta did not do so.

The Court also found the accused had not rebutted the presumption raised against him that he knew the nature of the contents of the paper bag P20 and also the Court held that he had not rebutted the presumption he was trafficking in that dangerous drug.

The Court found him guilty as charged.

As for sentence the prosecution applied, as directed, that the accused be given the death sentence although at the time of the commission of the offence the amendment to the alternative life sentence was available to him. The prosecution urged on the Court to apply and follow *PP v. Oon Lai Hin* [1984] 1 CLJ (Rep) 317, where the Federal Court held that where a person is guilty of trafficking in dangerous drug in substantial quantity a distinction should not be made of the type of the dangerous drug and the death sentence should be meted out and it was a preamendment law where alternative life sentence could be given. The Court agreed with the submission of the learned DPP that dangerous drug has indeed become a menace and could even be a cancer to society if it remains unchecked. I shudder to think of what would happen if the number of addicts exceeds the non-addicts. Following what was said in *Chang Liang Seng* [1982] 2 MLJ 231 the Court gave the death sentence to mark the gravity of the offence, to emphasize the public disapproval of it, to serve as a deterrent to others and to punish the offender of his grave offence and above all to protect the public.

The accused appeals.

Also found at [1988] 2 CLJ 312